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No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the federal government to respond to public dangers resulting from the improper disposal of hazardous substances. Section 107(a)(2) of CERCLA provides that any corporation that "owned or operated any facility at which such hazardous substances were disposed of" shall be liable to the United States for the government's response costs at the facility. 42 U.S.C. 9607(a)(2). The question presented is:

Whether a corporation that actively participated in, and exercised control over, the operations of a subsidiary may be held liable under CERCLA as an operator of the subsidiary's facility.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America. Respondents are CPC International, Inc., Aerojet-General Corporation, Cordova Chemical Company, Cordova Chemical Company of Michigan, and the Michigan Department of Environmental Quality. The Michigan Department of Environmental Quality has filed a separate petition for a writ of certiorari. See *Michigan Dep't of Envtl. Quality* v. *CPC International, Inc.*, No. 97-296.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-54a) is reported at 113 F.3d 572. The opinion of the district court (Pet. App. 55a-129a) is reported at 777 F. Supp. 549. The initial opinion of the court of appeals (Pet. App. 130a-170a) is reported at 59 F.3d 584. The court of appeals' order granting rehearing (Pet. App. 171a-172a) is reported at 67 F.3d 586.

JURISDICTION

The court of appeals entered its initial decision on July 14, 1995. The court of appeals granted a petition for rehearing and suggestion for rehearing en banc on October 19, 1995, and it entered its en banc decision on May 13, 1997. On August 4, 1997, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9607(a), provides in relevant part:

(a) Covered persons; * * *

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

* * * * *

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

* * * * *

shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

* * * * *

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the United States to protect the public from the release of hazardous substances and to recover the government's expenses from the responsible parties. The United States brought this CERCLA action against CPC International, Inc. (CPC), Aerojet-General Corporation (Aerojet), and other parties to recover the government's past and future costs of responding to a release of hazardous substances at a former chemical manufacturing plant near Muskegon, Michigan. The United States District Court for the Western District of Michigan ruled that CPC, Aerojet, and their subsidiaries are liable for the federal government's response costs, specifically finding CPC and Aerojet liable as operators of the facility. A divided court of appeals reversed the district court's decision as to CPC and Aerojet. On petition for rehearing and suggestion for rehearing en banc, a divided en banc court of appeals reached the same result and reversed the district court's determination that CPC and Aerojet are liable as operators.

1. "CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). Congress enacted CERCLA in 1980, in response to the serious public health threats posed by abandoned or inactive waste disposal facilities. See, *e.g.*, H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. I, at 17-22 (1980). Committee reports describing those threats concluded that

existing federal laws prospectively regulating hazardous waste disposal were "clearly inadequate to deal with this massive problem" and that special legislation was needed "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with [those] sites." *Id.* at 17-18, 22.

CERCLA establishes a basic framework for government action in response to releases and threatened releases of hazardous substances. Section 104 of CERCLA authorizes the President of the United States to respond directly to releases or threatened releases by undertaking "removal" and "remedial" actions in conformity with the National Contingency Plan (NCP). 42 U.S.C. 9604. Section 105 directs that the NCP shall include a National Priorities List (NPL) identifying the sites that pose the most serious need for cleanup. 42 U.S.C. 9605; see 40 C.F.R. Pt. 300 (setting out the NCP and NPL). Section 106 of CERCLA grants the President authority to issue orders and to seek injunctive relief to compel liable persons to respond to releases or threats of release. 42 U.S.C. 9606.[1]

CERCLA also provides a mechanism for financing government-initiated cleanups of hazardous waste sites. Upon satisfying statutory conditions, the United States may use the "Hazardous Substance Superfund" as the initial source of funding for federal response actions. See CERCLA §§ 101(11), 104, 42

[1] CERCLA grants authority to the President, who has delegated most of the authority for administering CERCLA to the Administrator of the Environmental Protection Agency (EPA). Exec. Order No. 12,580, 3 C.F.R. 193 (1988 comp.), *reprinted in* 42 U.S.C. 9615 note.

U.S.C. 9601(11), 9604; 26 U.S.C. 9507. The United States may then bring judicial actions against responsible parties under Section 107 of CERCLA to recover the government's response costs and replenish the Superfund. 42 U.S.C. 9607. Section 107 allows parties other than the federal government to recover necessary costs of response in certain circumstances, while Section 113 allows liable parties to seek contribution from other liable parties. See CERCLA § 107(a)(B), 42 U.S.C. 9607(a)(B); CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1).

The United States is entitled to cost recovery under Section 107 if it establishes four basic elements that, Congress has determined, justify the imposition of liability. The United States must show that: (1) there has been a "release" or "threatened release" of "hazardous substances" from a site; (2) the site is a "facility"; (3) the release or threatened release has caused the United States to incur "response costs"; and (4) the defendant is a party who, under the standards that Congress has set out in CERCLA, is responsible for the government's incurring of those costs. CERCLA § 107(a), 42 U.S.C. 9607(a); see, *e.g.*, *B.F. Goodrich Co.* v. *Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1378-1379 (8th Cir. 1989).

Section 107(a) specifically identifies four categories of parties who are potentially liable for the government's response costs. They are: (1) current owners and operators of a facility at which there is or has been a release or threatened release of a hazardous substance; (2) persons who owned or operated the facility at the time of disposal of a hazardous substance; (3) persons who arranged for disposal or treatment of a hazardous substance at the facility; and

(4) persons who selected the site and transported hazardous substances to the facility. CERCLA § 107(a)(1)-(4), 42 U.S.C. 9607(a)(1)-(4).[2]

The courts have consistently ruled that, once the United States has established the four elements of CERCLA liability, the responsible party is strictly liable, without any additional showing of causation, for the government's response costs. *E.g.*, *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *Aceto Agric. Chems.*, 872 F.2d at 1377; *United States* v. *Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

The courts have also consistently ruled that, if the harm from the release of hazardous substances is indivisible, the responsible parties are jointly and severally liable. *E.g.*, *Kayser-Roth*, 910 F.2d at 26; *R.W. Meyer*, 889 F.2d at 1507; *Aceto Agric. Chems.*, 872 F.2d at 1377; *Monsanto*, 858 F.2d at 172. Responsible parties may obtain an equitable allocation of costs by seeking contribution from other responsible parties. CERCLA § 113, 42 U.S.C. 9613. See *R.W. Meyer*, 889 F.2d at 1507; *Monsanto*, 858 F.2d at 173; see also H.R. Rep. No. 253, 99th Cong., 1st. Sess. Pt. 1, at 79 (1985).

2. This case arises out of the United States' attempt to recover its costs of responding to acutely

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[2] CERCLA provides definitions of a number of the relevant terms, including "facility," "hazardous substance," "owner or operator," "person," "release," "transport," and "disposal." See CERCLA § 101, 42 U.S.C. 9601 (1994 & Supp. II 1996).

hazardous conditions at a former chemical manufacturing plant in Dalton Township, Michigan, commonly known as the "Muskegon" site. A series of chemical companies extensively contaminated that site through operations from 1959 through 1986.

a. The Ott Chemical Company (Ott I), a publicly traded Michigan corporation managed by principal shareholder Arnold Ott, owned the Muskegon site from 1957 to 1965. Ott I located its sole chemical manufacturing facility at that site, and it engaged in various activities that resulted in the disposal and release of hazardous substances. For example, Ott I discharged waste water containing hazardous substances into two unlined lagoons at one part of the site, it buried drums containing hazardous substances at another, it spilled hazardous substances in the processing and loading areas of the site, and it dumped hazardous substances in a wooded portion of the site. By 1964, test results showed that Ott I's disposal practices had contaminated the groundwater flowing beneath the site. Pet. App. 60a-61a, 63a-64a.

b. In 1965, CPC acquired Ott I by incorporating a new subsidiary that purchased Ott I's assets in exchange for CPC stock and assumed the name of Ott Chemical Company (Ott II). Pet. App. 65a-66a. Arnold Ott became an officer of CPC. Ott I changed its name to the Muskegon Chemical Company and shortly thereafter ceased to exist. *Id.* at 66a. Under CPC's ownership, Ott II expanded the chemical manufacturing activities and waste disposal activities at the Muskegon site. *Id.* at 66a-67a. CPC actively participated in and exerted control over Ott II's business, including environmental matters, through the direct involvement of Arnold Ott and other CPC officers in Ott II's policy decisions and day-to-day opera-

tions. *Id.* at 67a-77a. CPC continued those operations through 1972. *Id.* at 78a.

c. In 1972, CPC sold Ott II to Story Chemical Company, a Georgia corporation. Pet. App. 59a, 78a. Story continued Ott II's operations under the name of Four Lakes Chemical Company. Story, however, soon encountered financial problems and, in 1976, it filed for bankruptcy protection. *Ibid.* Story was adjudicated bankrupt in 1977, and title to the Muskegon site passed to the bankruptcy trustee. *Ibid.* The Michigan Department of Natural Resources (MDNR) recognized that the Muskegon site posed severe environmental hazards, and it became actively involved in efforts to attract a buyer for the site. *Id.* at 79a-81a.

d. In 1977, after extensive discussions with MDNR, Aerojet arranged to acquire the Muskegon site. Pet. App. 81a-83a, 92a. Aerojet created a wholly owned California subsidiary called Cordova Chemical Company (Cordova/California) that purchased the Muskegon site from the Story bankruptcy trustee. *Id.* at 82a-83a, 93a. In connection with that purchase, Cordova/California and MDNR entered into an agreement under which Cordova/California agreed to undertake certain cleanup actions, MDNR agreed to share in the funding of those actions, and MDNR agreed to indemnify Cordova/California for other expenses. *Id.* at 83a-91a.

e. In 1978, shortly before commencement of chemical manufacturing activities at the site, Cordova/California created a wholly owned Michigan subsidiary, Cordova Chemical Company of Michigan (Cordova/Michigan), and transferred ownership of the Muskegon site to that company. Pet. App. 93a-94a. With the active participation of Aerojet, the Cordova

companies conducted chemical production activities at the Muskegon site until 1986. *Id.* at 93a-100a.

f. In 1981, shortly after the enactment of CERCLA, the EPA identified the Muskegon site as posing extraordinary public health risks. In 1982, the EPA placed the site on the NPL. See p. 4, *supra*; 40 C.F.R. Pt. 300, Apps. A and B (Table 1). Since that time, the EPA has incurred response costs in developing and implementing a comprehensive, multi-million dollar remedial plan to protect the public from harm. The final remedy will decontaminate the soil, surface water, and groundwater at the site. See Pet. App. 62a-63a.

3. The United States filed a cost recovery action under Section 107 of CERCLA, naming five entities as responsible parties: (1) CPC; (2) Aerojet; (3) Cordova/California; (4) Cordova/Michigan; and (5) Arnold Ott. In anticipation of the United States' suit, CPC had already filed an action for contribution from Aerojet, Cordova/California, Cordova/Michigan, and MDNR. CPC also filed a third-party complaint against its insurer. The district court consolidated the actions and scheduled them for trial in three phases addressing, sequentially, the issues of liability, remedy, and insurance coverage. Pet. App. 56a n.1. On the eve of the liability trial, Arnold Ott reached a settlement with the United States respecting his liability. *Id.* at 56a n.2.

The district court conducted a 15-day bench trial on the liability of the remaining parties. Those parties stipulated that there had been "releases" of "hazardous substances" from the Muskegon site, that the Muskegon site is a "facility," and that the United States had incurred reimbursable "response costs." See Pet. App. 63a. The trial accordingly focused on

whether the non-settling entities had owned the facility, operated the facility, or arranged for disposal of wastes at the facility within the meaning of Section 107(a) of CERCLA. In resolving those issues, the district court specifically concluded that CPC and Aerojet are liable under Section 107(a)(2) of CERCLA on the ground that each had directly participated in the operation of the Muskegon site during a relevant time period. *Id.* at 128a-129a; see *id.* at 65a-78a, 92a-100a, 110a-112a, 123a-125a.[3]

The district court concluded that "a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste." Pet. App. 107a. The court found CPC and Aerojet liable under that standard. See *id.* at 110a-112a, 123a-125a.

The district court set out extensive factual findings in support of its conclusion. In relation to CPC, the court specifically found, for example, that:

(1) "CPC actively participated in, and at times controlled, the policy-making decisions of its subsidiary through its representation on the Ott II board of directors," which "functioned as a major source of power and decision-making at the company" (Pet. App. 67a);

(2) "CPC also actively participated in and exerted control over day-to-day decision-making at Ott II through representation in the highest

[3] The district court made a number of other liability rulings. See Pet. App. 128a-129a. Those rulings are not at issue in this petition.

levels of the subsidiary's management" (*id.* at 69a);

(3) "CPC's development company also actively participated in and exerted control over policy-making at Ott II in efforts to enhance performance, shape decisions and affect personnel changes" (*id.* at 72a);

(4) "CPC actively participated in Ott II environmental matters" (*id.* at 74a);

(5) "CPC also exerted significant control over Ott II's finances," "actively participated in some Ott II labor matters," and "also participated in other aspects of Ott II's business" (*id.* at 76a, 77a).

The court determined that "[t]he evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator." *Id.* at 111a.

The district court similarly found that Aerojet, like CPC, "operated the site through active participation and pervasive control over the businesses of both Cordova/California and Cordova/Michigan," and that "Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary." Pet. App. 124a. The court accordingly concluded that Aerojet, like CPC, is directly liable as an operator under Section 107(a)(2). *Id.* at 123a-125a.

The district court noted that, while CERCLA imposes direct liability on a corporation based on its own participation in the operation of a facility, a corporation may also be subject to vicarious liability for a subsidiary's actions through the application of equita-

ble principles that allow a court to disregard the separate corporate identities of a parent and its subsidiary "to prevent fraud, illegality or injustice." Pet. App. 108a-109a. The court found the evidence sufficient under that so-called "veil-piercing" theory to hold Aerojet vicariously liable as a present owner of the facility under Section 107(a)(1) of CERCLA. *Id.* at 119a-122a. The court concluded that, in light of its holding that Aerojet and CPC were directly liable as operators under Section 107(a)(2) based on their own actions, there was no need to apply the state veil-piercing theory in that context. *Id.* at 112a, 124a-125a.

4. A divided panel of the Sixth Circuit reversed various aspects of the district court's decision, including its conclusion that CPC and Aerojet are liable as past operators of the Muskegon facility. See Pet. App. 130a-170a. The panel majority ruled, as a matter of law, that CPC and Aerojet cannot be held liable under CERCLA as operators of the Muskegon site unless the evidence provides a basis for disregarding their corporate form under state-law veil-piercing principles. *Id.* at 143a-144a. The court also held that, under Michigan state law, the corporate veil may be pierced only upon a finding of a fraudulent purpose. *Id.* at 144a.

5. The United States filed a petition for rehearing and suggestion for rehearing en banc on the question whether CPC and Aerojet are directly liable as operators under Section 107(a)(2) of CERCLA. The court of appeals granted the petition and vacated the panel decision. Pet. App. 171a-172a. On rehearing en banc, a divided court of appeals reversed the district court's judgment with respect to the two parent corporations. *Id.* at 1a-54a.

In a 7 to 5 vote, the court of appeals rejected the legal theory, urged by the United States and relied upon by the district court, that a parent corporation may be held liable under CERCLA as an "operator" of a facility by virtue of the parent corporation's active participation in and exercise of control over the management and operations of a subsidiary that owns the facility. The court acknowledged that a parent corporation could "conceivably" be liable as an operator in some situations:

> At least conceivably, a parent might independently operate the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate the facility alongside its subsidiary.

Pet. App. 12a. The court concluded, however, that "this is not a theory of operator liability relied upon by the district court, or alluded to in its opinion." *Ibid.* The court characterized the district court's decision as holding that "parent corporations can attain operator status by exerting significant control over the operations of their subsidiaries." *Id.* at 13a. It specifically rejected that ruling, stating:

> [W]here a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. § 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met.

Id. at 15a. The court additionally stated that the federal government must satisfy the state-law standards for piercing the corporate veil, which in Michigan would require a showing that "adherence to the fiction of separate corporate existence would sanction a

fraud or promote injustice." *Id.* at 16a. The court concluded that, under Michigan law, the facts did not provide an adequate basis for piercing the corporate veil with respect to the two parent corporations involved in this case. *Id.* at 16a-17a, 21a-22a.[4]

Judge Ryan, joined by four other judges, dissented from the court's decision. Pet. App. 32a-54a. The dissenting judges criticized the majority for failing to adhere to the plain language of CERCLA's liability provisions. See *id.* at 32a-34a. They concluded that Section 107(a)(2) subjects a parent corporation to direct liability as an operator of a facility if the facts show that the parent corporation "actually operat[ed] [the] facility, regardless of the nature of the entity's ostensible interest in the facility." *Id.* at 34a. The dissenting judges noted that the majority's reasoning is particularly unpersuasive in the face of the numerous decisions of other courts of appeals, which support the district court's conclusion that a parent corporation may be liable as an operator of a subsidiary's facility through its active participation in and control over the day-to-day management of the subsidiary's business. *Id.* at 34a-41a.[5]

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[4] In addition, the court of appeals directed the district court on remand to make further findings regarding whether disposal of hazardous substances occurred while Aerojet and the Cordova companies owned the site and to revisit its conclusion that those companies had failed to prove their entitlement to a third-party defense under Section 107(b)(3) of CERCLA, 42 U.S.C. 9607(b)(3). See Pet. App. 22a-24a.

[5] The dissenting judges also criticized the majority's characterization of the district court's factual findings and its interpretation of Michigan law. Pet. App. 41a-50a. Judge Merritt, concurring in part and dissenting in part, filed a separate opinion stating that federal common law, and not state law, governs the standard for piercing the corporate veil. *Id.* at 24a-32a.

REASONS FOR GRANTING THE PETITION

The court of appeals has misinterpreted CERCLA, an important federal statute governing the United States' authority to respond to the public dangers posed by the release of hazardous substances. The court has concluded, contrary to the plain language of Section 107 of CERCLA, that a corporation that actively participates in and exercises control over a subsidiary's operations cannot be held liable, on that basis, as an operator of the subsidiary's facility. The court's decision is not only mistaken, but it squarely conflicts with the decisions of four other courts of appeals, which have consistently imposed operator liability in similar circumstances. This Court should grant the petition to correct the court of appeals' decision and resolve the conflict among the circuits on the important question of parent corporation liability under CERCLA.

1. Congress enacted CERCLA to create a federal mechanism for addressing the national problem posed by decades of improper disposal of toxic chemicals. CERCLA authorizes the United States to undertake direct response actions to protect the public from the release of hazardous substances, using federal funds earmarked for that purpose. See CERCLA § 104, 42 U.S.C. 9604. CERCLA further provides that the United States may recover its response costs from the parties that Congress has deemed responsible for creating the hazardous conditions. See CERCLA § 107, 42 U.S.C. 9607.

a. Section 107 of CERCLA establishes a federal liability standard. Of particular relevance here, Section 107(a)(2) states that the liable parties include

> any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

42 U.S.C. 9607(a)(2). Under the plain language of that provision and the pertinent CERCLA definitions, a corporation that operates a subsidiary's facility at which hazardous substances are disposed of is liable for the government's response costs.

As a threshold matter, CERCLA defines the term "person" to include a broad range of entities, including corporations and other business organizations. CERCLA § 101(21), 42 U.S.C. 9601(21). Thus, CERCLA clearly envisions that a corporation may be liable as an operator of a facility. The issue in this case accordingly turns on whether CPC and Aerojet "operated" the Muskegon site, which is the facility in question. See Pet. App. 63a; CERCLA § 101(9), 42 U.S.C. 9601(9).

CERCLA defines the "owner or operator" of a facility to include "any person owning or operating such facility," CERCLA § 101(20)(A), 42 U.S.C. 9601(20)(A), but it does not further define the term "operate." Under settled principles of statutory construction, that term should be construed in accordance with its "'ordinary or natural' meaning." *Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995); *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994); *Smith* v. *United States*, 508 U.S. 223, 228 (1993); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).

Under standard usage, a corporation "operates" a facility if it actively participates in, and exercises control over, the running of the facility. See, *e.g.*, *The Oxford English Dictionary* 848 (2d ed. 1989) (defining "to operate" as "[t]o direct the working of; to manage, conduct, work (a railway, business, etc.)"); *The Random House Dictionary of the English Language* 1357 (2d ed. 1987) (defining "to operate" as "to put or keep (a factory, industrial system, ranch, etc.) working or in operation"); *Webster's Third New International Dictionary* 1581 (1976) (defining "to operate" as "to manage and put or keep in operation whether with personal effort or not <*operated* a grocery store>").

The district court correctly applied that standard to the evidence and properly concluded that CPC and Aerojet, during separate time periods, had each operated the Muskegon site. For example, in the case of CPC, the district court found that the corporation had placed its own high level officers in key management positions of its subsidiary specifically to ensure that CPC would actively participate in and maintain close control over the day-to-day running of the subsidiary's business at the Muskegon site. See Pet. App. 67a-77a, 110a-112a. The evidence shows that Aerojet similarly engaged in active participation and control with respect to the operation of the Muskegon site during a later time period. *Id.* at 94a-100a, 123a-124a.

b. The court of appeals rejected the district court's straightforward interpretation of Section 107(a)(2). In doing so, the court engaged in a lengthy discussion of canons of construction and general principles of corporate liability, but it paid scant attention to the

actual language of Section 107(a)(2). See Pet. App. 7a-12a. It provided no explanation why the term "operated" should not be given its "ordinary or natural meaning." The court briefly discussed CERCLA's definition of "owner or operator" as it relates to facilities that have been involuntarily conveyed to a state or local government. *Id.* at 13a. But it misunderstood the significance of that portion of the definition.

Section 101(20) of CERCLA defines the term "owner or operator" with reference to the context in which the term is used. See 42 U.S.C. 9601(20) (1994 & Supp. II 1996). When Congress enacted the original version of CERCLA in 1980, Section 101(20)(A) provided in relevant part as follows:

> "[O]wner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment.

Pub. L. No. 96-510, § 101(20)(A), 94 Stat. 2769. As the text of that provision indicates, Congress saw a need to address a special problem posed by abandoned facilities. Congress recognized that abandoned facilities were likely to be non-operational, and it therefore made clear in Section 101(20)(A)(iii) that the term "owner or operator" includes persons who "otherwise controlled activities" at a non-operational site before its abandonment.

When Congress amended CERCLA in 1986, it retained the original version of Section 101(20)(A)(i) and (ii), but it modified clause (iii) to address the question of state liability for abandoned facilities. See Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 101(b)(2), 100 Stat. 1615. Congress provided that if a state or local government received "title or control" of a facility through an involuntary mechanism, such as abandonment, the "owner or operator" would be the person "who owned, operated, or otherwise controlled activities at such facility immediately beforehand." *Ibid.* Recognizing that those facilities may be non-operational, Congress carried forward the "otherwise controlled" language of the original clause. See CERCLA § 101(20)(A)(iii), 42 U.S.C. 9601(20)(A)(iii).

The court of appeals inferred from Congress's use of the "otherwise controlled" language that "the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility." Pet. App. 13a. As the text of the original and amended provision shows, that is simply not the case. Congress retained the "otherwise controlled" language in clause (iii) to make clear that the term "owner or operator" includes persons who "controlled activities" at an inactive facility. That language provides no basis for the illogical conclusion that the term "owner or operator" excludes persons who controlled the operations of an active facility.

The court of appeals rejected the Section 107(a)(2) liability standard that the district court employed without further analysis of the statutory terms. See Pet. App. 13a. Instead, the court invoked its own policy notions respecting appropriate liability standards for parent corporations. *Id.* at 13a-15a. Based

on those considerations, the court of appeals concluded that "the parent will be liable only when the requirements necessary to pierce the corporate veil are met." *Id.* at 15a. That conclusion misconceives the relevance of a parent-subsidiary corporate structure and misapplies the equitable doctrine for "piercing the corporate veil."

A corporation that owns a separately incorporated subsidiary is generally insulated, by virtue of the subsidiary's separate corporate form, from liability for the *subsidiary's* actions. See, *e.g.*, William O. Douglas & Carrol M. Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929). The parent corporation, however, is not insulated from liability for its *own* acts. See, *e.g.*, *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922) ("A corporation is responsible for the wrongs committed by its agents in the course of its business."). Hence, in a situation, like the one presented here, where the evidence shows that a parent corporation, through the use of *its own agents*, actively participated in the subsidiary's operation of a facility, the parent corporation is directly liable under federal law. There is no need to invoke equitable doctrines for "piercing the corporate veil." See Pet. App. 35a-38a (Ryan, J., dissenting); *id.* at 112a, 124a-125a.[6]

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[6] The court of appeals suggested that the district court held CPC and Aerojet liable for "traditional" oversight of a subsidiary, implying that those corporations "participate[d] in the affairs of its subsidiary consistent with the restrictions imposed by traditional corporations [*sic*] law." Pet. App. 13a. The district court, however, expressly found otherwise. It concluded that CPC and Aerojet engaged in conduct "that exceeds the bounds of an interested investor," *id.* at 111a, and "extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary," *id.* at 124a.

At bottom, the court has simply failed to account for "the language of the statute." See, *e.g.*, *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 295 (1995); Pet. App. 32a-34a (Ryan, J., dissenting). It is Congress's prerogative to establish the appropriate standard for CERCLA cost recovery actions. Congress spoke to the issue directly in Section 107, and its standard is readily ascertainable by construing the statute according to its plain terms. As Judge Ryan noted, "the plain language of section 107(a)(2) indicates that Congress intended to impose liability on *any* entity actually operating a facility, regardless of the nature of the entity's ostensible interest in the facility." *Id.* at 34a (Ryan, J., dissenting). The district court properly applied Section 107(a)(2) by reference to the ordinary meaning of the words Congress used, and it correctly found CPC and Aerojet directly liable based on the evidence before it. There is no basis, in policy or otherwise, to impose additional requirements drawn from state-law principles governing derivative liability. Cf. *Atherton* v. *FDIC*, 117 S. Ct. 666, 670 (1997) ("No one doubts the power of Congress to legislate rules for deciding cases like the one before us.").[7]

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[7] We note that the court's policy analysis is itself flawed. It is far from clear, for example, that "the traditional doctrine of piercing the corporate veil" provides a "relatively bright line" standard. Pet. App. 14a; compare, *e.g.*, *id.* at 29a-31a (Merritt, J., dissenting in part) (describing the federal common law standard); *id.* at 45a-46a (Ryan, J., dissenting) (disputing the majority's interpretation of the Michigan standard). As commentators have long observed, the so-called "traditional" doc-

2. The court of appeals' decision in this case not only is erroneous, but it also conflicts with the decisions of other courts of appeals that have encountered the question. Six of the other courts of appeals have squarely considered the question whether a corporation may be directly liable based on its active participation in and control over the operations of a subsidiary. Four of the circuits essentially agree with the standard that the United States urges, one adopts a broader liability standard, and one arguably follows the standard that the court of appeals adopted in this case. The court of appeals acknowledged the conflict, Pet. App. 13a-14a, which is clearly ripe for resolution.

a. Four courts of appeals have interpreted Section 107 to impose liability on corporations that actively participate in and exercise actual control over the operations of their subsidiaries. See *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), cert.

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trine is enveloped in a "mist of metaphors" that has not produced clear or uniform rules. See, *e.g.*, Douglas & Shanks, *supra*, 39 Yale L.J. at 218. It is also doubtful that the court's liability standard—which will prevent the government from recovering response costs from those parties that are actually responsible for creating the public danger—will encourage "private sector participation in the cleanup of existing sites." Pet. App. 14a. The court's interpretation is likely, instead, to thwart CERCLA's central purpose of creating "a compelling incentive for those in control of hazardous substances to prevent releases and thus protect the public from harm." S. Rep. No. 848, 96th Cong., 2d Sess. 14, 17-18 (1980). Of course, even if the court's policy analysis were more persuasive, it is ultimately beside the point. The question of appropriate policy in this area is a matter for Congress, which has spoken to that issue through the liability standard that it has established.

denied, 498 U.S. 1084 (1991); *Schiavone* v. *Pearce*, 79 F.3d 248 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth.* v. *Tonolli Corp.*, 4 F.3d 1209, 1220-1225 (3d Cir. 1993); *Jacksonville Elec. Auth.* v. *Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993).

The First Circuit ruled in *Kayser-Roth* that a parent corporation was directly liable under Section 107(a)(2) for the government's costs in responding to the release of hazardous substances at a subsidiary. 910 F.2d at 26-28. The court determined from its "analysis of the statute and its legislative purpose and history" that a corporation may be found liable as an operator on account of its pervasive involvement in the subsidiary's operations. *Id.* at 26. The court noted that other courts have consistently construed the term "operator" to include corporate officers and shareholders who participate in the operation of a facility. *Id.* at 26-27. It concluded that a parent corporation that participates in the operation of a subsidiary's facility is similarly liable. *Id.* at 27. See also *John S. Boyd Co.* v. *Boston Gas Co.*, 992 F.2d 401, 407-408 (1st Cir. 1993).

The Second Circuit reached a similar result in *Schiavone*, which involved a private action over the effect of an indemnification agreement on CERCLA liability. 79 F.3d at 250-251. The court observed that a parent may be charged with "owner liability" only "in circumstances that permit corporate veil piercing," but a parent may be charged with "operator liability" based on "the independent actions of the parent corporation, evidenced through its control over the polluting site." *Id.* at 254. That court specifically rejected the analysis set forth in the panel decision in this case and concluded that "direct operator liability for parent corporations is both compatible with the

statutory language and consistent with CERCLA's broad remedial scheme." *Id.* at 255. See also *Certain Underwriters at Lloyd's* v. *St. Joe Minerals Corp.*, 90 F.3d 671, 674 (2d Cir. 1996).

The Third Circuit applied the same reasoning in *Lansford-Coaldale Joint Water Authority*, which involved a private cost-recovery action under Section 107(a)(B) of CERCLA. See 4 F.3d at 1213-1214. The court concluded that a parent corporation could be held liable as an operator if "there is evidence of substantial control exercised by one corporation over the activities of the other." *Id.* at 1221. The court explicitly followed the test applied in *Kayser-Roth* and the district court decision in this case, stating that the "actual control" standard "hold[s] accountable for environmental violations those corporations which are not mere investors in other corporations, but instead have actively and substantially participated in the corporation's management." *Id.* at 1222. See also *Aluminum Co. of America* v. *Beazer East, Inc.*, No. 96-3420, 1997 WL 535176, at *10-*13 (3d Cir. Sept. 2, 1997); *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc).

The Eleventh Circuit adopted the same approach in *Jacksonville Electric Authority*, which also involved a private cost-recovery action under Section 107(a)(B) of CERCLA. 996 F.2d at 1108-1109. The court stated that "[t]he plain language of the statute leads to the conclusion that a person is liable as an 'operator' when that person actually supervises the activities of the facility. That is, the person must play an active role in the actual management of the enterprise." *Id.* at 1110. The court concluded that a parent corporation is directly liable under Section 107(a)(2) if the parent "exercises actual and pervasive control of the

subsidiary to the extent of actually involving itself in the daily operations of the subsidiary." *Ibid.*[8]

b. The Fourth Circuit has adopted a more expansive standard of operator liability than that urged by the United States or relied upon by the district court in this case. That court has indicated in a private cost-recovery action that the mere "authority to control the facility" is sufficient for establishing operator liability. *Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F.2d 837, 842, cert. denied, 506 U.S. 940 (1992). The United States does not endorse liability based solely on the "authority to control," as is commonly urged by private parties. The existence of the Fourth Circuit's standard, however, deepens the conflict among the courts of appeals.[9]

c. The Fifth Circuit is the only court of appeals that heretofore had employed the restrictive standard

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[8] In addition to the decisions of those courts, the Eighth and Ninth Circuits have indicated in dicta that a parent corporation may be held liable as an operator based on its control over a subsidiary's facility. See *United States* v. *TIC Investment Corp.*, 68 F.3d 1082, 1091 (8th Cir. 1995), cert. denied, 117 S. Ct. 50 (1996); *American Telephone & Telegraph Co.* v. *Compagnie Bruxelles Lambert*, 94 F.3d 586, 590 n.8, opinion supplemented on other grounds, No. 94-16368, 1996 WL 490789 (9th Cir. Aug. 28, 1996). The Seventh and Tenth Circuits have resolved the analogous issue of whether individual corporate officers may be liable under CERCLA by applying a standard based on personal participation and actual control. See *Sidney S. Arst Co.* v. *Pipefitters Welfare Educ. Fund*, 25 F.2d 417, 420 (7th Cir. 1994); *FMC Corp.* v. *Aero Indus., Inc.*, 998 F.2d 842, 846 (10th Cir. 1993).

[9] Indeed, because private parties frequently argue for more expansive theories of parent liability than the United States urges, there is a heightened need for the Court to address the issue and clarify the controlling standard.

of parent liability that the court of appeals applied in this case. That court initially ruled in a private cost-recovery action that a parent corporation's liability must be established through a corporate veil-piercing standard. *Joslyn Mfg. Co.* v. *T.L. James & Co.*, 893 F.2d 80 (1990), cert. denied, 498 U.S. 1108 (1991). The continuing vitality of that precedent, however, is open to question. That court has since ruled that individual officers and employees may be held directly liable as operators under CERCLA, when "they themselves actually participate in the wrongful conduct prohibited by the Act," and that "this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'" *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.) (quoting *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987)), cert. denied, 502 U.S. 1004 (1991).

3. As the foregoing survey demonstrates, the court of appeals' decision in this case stands in square conflict with the decisions of four other circuits, which recognize that CERCLA creates a federal liability standard that subjects corporations to direct liability based on their actual involvement in the operation of a subsidiary's facility. That conflict presents an issue of considerable importance. The United States seeks to recover its CERCLA response costs from a parent corporation when the evidence shows, as in this case, that the parent has actively participated in and exercised control over the subsidiary's operation of a facility. Because many parent corporations do not engage in the type of active participation and control shown here, the United States does not routinely seek to hold parent

corporations liable for conditions at a subsidiary's facility. The principle at issue in this case, nevertheless, is vital in ensuring that the United States can effectuate Congress's policy in responding to the public dangers posed by hazardous waste sites. Indeed, this case illustrates precisely why Congress empowered the United States to seek cost recovery from parent corporations in appropriate situations.

The Muskegon site is "one of the nation's most severely contaminated areas." Pet. App. 56a. The total federal expenditures for cleaning up hazards left by its owners and operators will total many tens of millions of dollars. Among potentially responsible parties, Ott I, Ott II, and Story no longer exist, while the Cordova companies, from the outset, have had little capital. See *id.* at 93a, 99a-100a. Hence, CPC and Aerojet are not only responsible for creating the hazardous conditions at the Muskegon site, but they are also the only responsible parties that can contribute meaningfully to the cleanup of the site. If those companies are absolved of liability, then the general public must assume the costs of cleanup.

CERCLA expresses a fundamental policy that those who are responsible for creating hazardous conditions, rather than the innocent public, should bear the costs of responding to those hazards. H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. I, at 17 (1980). See *United States* v. *Aceto Agric. Chems.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *United States* v. *Monsanto Co.*, 858 F.2d 160, 167 n.8 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). When a parent corporation steps beyond its role as the stockholder of a subsidiary and actually participates in the day-to-day operation of a sub-

sidiary and its facility, CERCLA dictates that the corporation should be responsible, together with other parties that owned or operated the facility, for the costs of cleanup.

The court of appeals' decision thwarts that congressional policy. It establishes a judicially created exception to Section 107(a)(2)'s liability standard that is contrary to the language of CERCLA and inconsistent with its goals. In ultimate effect, that exception would diminish the fairness of CERCLA's liability provisions, which subject parties to liability on the basis of their own actions and not on the basis of their corporate form. Particularly in light of the squarely conflicting holdings by other courts of appeals, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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